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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 970

KAHN ENGINEERING CO., INC., *Petitioner*,

v.

AMERICAN SECURITY & TRUST COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN SECURITY AND TRUST COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the United States District Court for the District of Columbia, the trial court, was correct, as held by the United States Court of Appeals for the District of Columbia Circuit, in directing a finding for respondent at the close of petitioner's case when

petitioner had not made out a prima facie case that it was the named payee of a check for $23,069.41 which on its face was not payable to petitioner.

STATUTES INVOLVED

In addition to the statutes recited by petitioner the following are involved:

Uniform Negotiable Instruments Law, Title 28, D. C. Code, 1951 Edition, Act of March 3, 1901, 31 Stat. 1395, et seq, Ch. 954, sections as follows:

102. An instrument to be negotiable must conform to the following requirements: * * *

Fifth. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty.

120. The signature of any party may be made by a duly-authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.

314. Where the name of a payee or indorsee is wrongly designated or misspelled he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

402. A holder in due course is a holder who has taken the instrument under the following conditions:

First. That it is complete and regular upon its face.

Second. That he became the holder of it before it was over due, and without notice that it had been previously dishonored, if such was the fact.

Third. That he took it in good faith and for value.

Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating.

STATEMENT

This case involves an attempt on the part of one of two originally interrelated close corporations to impose its claimed, though disputed, loss on a building contract that was in process at the time of the separation of the corporations upon a bank that accepted and collected a check in the regular course of its business.

Originally Kahn Engineering Co., Inc. and Kahn Engineering Co. of Md., Inc. were close corporations having common stockholders, officers and directors. (R. 20-22, 25, 33, 39, 86-88, 112, 140, 170, 175, 181, 183) On November 17, 1953 the Commissioners of Baltimore County, Maryland and Kahn Engineering Co., Inc. entered into a contract to build the Parkville Fire and Police Station in Towson, Maryland. (R. 113-116) The job was performed by Kahn Engineering Co. of Md., Inc. until September 3, 1954. (R. 45, 50-51, 54) On September 3, 1954 the principals determined to separate their business enterprises and a series of documents and agreements signifying this separation were executed. (R. 163-179) After this date the Parkville job became the responsibility of Kahn Engineering Co., Inc. (R. 27, 28)

The check in question was dated August 11, 1954, was issued upon the requisition of Kahn Engineering Company of Maryland, Inc. (R. 151-152), and was payable to Kahn Engineering Company [sic] in the amount of $23,069.41. (R. 118a)

Appendix A attached hereto is a table showing the manner in which payments were made on the Park-

ville job. This table shows that each monthly check, starting in February, 1954, and including the one here in question issued in August, 1954, were intended by the maker to be payable to Kahn Engineering Co. of Md., Inc., the corporation that was performing the work for the maker.

In April, 1954 the name of Kahn Engineering Co. of Md., Inc. was formally changed to Academy Construction, Inc. (R. 26, 60, 139-140), but this, of course, did not affect the operation of, or responsibility for, the carrying forward of, the Parkville job. (R. 61)

The check in question was payable to Kahn Engineering Company (not the petitioner, Kahn Engineering Co., Inc.) was endorsed and deposited in respondent bank by Academy Construction, Inc., formerly Kahn Engineering Co. of Md., Inc. (R. 118b) Respondent bank collected the check and the proceeds thereof were paid out in regular course upon the order of its depositor. (R. 98-99)

At the close of petitioner's case below respondent moved for a directed verdict on grounds, *inter alia*, that there was no showing that the check in question was the property of petitioner at any time. This motion was granted. On appeal the propriety of this decision was affirmed.

ARGUMENT

The respondent will show in this brief, (1) that no question is present in this case that requires review; (2) that the case does not call for an exercise of this Court's supervisory jurisdiction; (3) that the United States Court of Appeals for the District of Columbia Circuit was correct in affirming the action of the

United States District Court for the District of Columbia.

1. *No Question is Presented in this Case that Requires Review.* Petitioner does not contend for nor show the presence of the usual grounds which would impel review by this Court, i.e., conflict of decisions between circuits, or an important federal question. This case presents a purely local question involving an application of usual rules to an ordinary commercial transaction.

2. *The Case Does Not Call For An Exercise Of This Court's Supervisory Jurisdiction.* Petitioner asserts that the action of the Circuit Court below justifies a review on the ground just stated. While not crystal clear it seems that its argument is based on two grounds, (1) that the ruling of the trial court was erroneous, and (2) that the United States Court of Appeals for the District of Columbia Circuit erroneously affirmed. The issues presented are thus identical.

The main thrust of petitioner's argument is that the Circuit Court mentioned an assignment (also called a release) by petitioner of the claim here sued on in its opinion, which assignment was not introduced into evidence but only marked for identification. Petitioner then argues that it, thus, was deprived of an opportunity to meet the issues presented by this assignment.

A short answer to this argument is that the final decision of the Circuit Court affirmed the trial court "even assuming that the above assignment was not effective." As the Circuit Court's decision was based on the failure of petitioner to make out a prima facie

case it seems unnecessary to discuss the effect of the assignment. In view, however, of the insistence by petitioner that it has not had an opportunity to meet the issues presented by the assignment, respondent will set the issue at rest.

If petitioner did not meet the issue raised by the assignment, sometimes called a release, it cannot be said that it was not on notice that the assignment was an issue in the case.

The second paragraph of respondent's pretrial statement specifically put in issue the release in the following language:

> "Plaintiff has released and assigned all its claim, including the present one, to other parties and, consequently, may not maintain this action". (R. 12)

The Circuit Court correctly recited in its decision that the third-party defendant asserted a similar defense in its answer. (R. 8) Third-party defendant also carried this defense into the pretrial order. (R. 14) It is thus apparent that petitioner was, or should have been fully apprised of this issue.

Respondent urged this issue before the Circuit Court but did so not on the ground that the particular document was in evidence, but on the ground that petitioner's principal witness, who was President of petitioner at all pertinent times, testified on cross-examination that petitioner had released its claims. The colloquy appearing at Record 90 set out in the footnote[1] hereto sets this point at rest.

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[1] "Q. And at that same time and those same agreements, you did also, on behalf of Kahn Engineering Company, Inc., acting as its President, and I refer specifically to Defendant's Exhibit No.

Under the circumstances the extraordinary remedy of invoking this Court's supervisory jurisdiction is obviously not called for. It is submitted that petitioner is merely seeking another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

3. *The United States Court of Appeals for the District of Columbia Circuit Was Correct in Affirming the United States District Court for the District of Columbia.* The check in question was payable to "Kahn Engineering Company". The petitioner is "Kahn Enginering Co. Inc." In order for petitioner to survive a motion for a directed verdict at the close of its case it was required to show that it was the named payee.

Title 28, § 102, D. C. Code, 1951 ed., provides a test of negotiability, as follows:

> "Fifth. Where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty."

The presumption is that title goes with possession. *Ogden* in his work on Negotiable Instruments (1909) recites in § 318, at p. 248, the presumptions that arise when a negotiable instrument is introduced into evidence. He states in such event there arises

> "a presumption of title on good consideration from the fact of possession."

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35 for identification, you did release on behalf of Kahn Engineering Company, Inc., each and every claim which it had against Academy Construction, Inc., did you not, sir?

• • •

"THE WITNESS: At the time this document was executed, we stipulated that the present indebtedness, which in our knowledge was between ten and twelve thousand dollars—*all claims at this time were released, yes, sir.*" (Emphasis supplied)

The check in question, as were all prior checks on this job, was delivered to the Maryland corporation either under its name as Kahn Engineering Co. of Md., Inc. or Academy Construction, Inc.

Title 28, § 314, D. C. Code, 1951 ed., provides:

> "Where the name of a payee or indorsee is wrongfully designated or misspelled he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature."

The endorsement placed on the instrument "Kahn Engineering Co., L. Ray Troxell, Jr., President" was strictly in accordance with this quoted provision of the uniform negotiable instrument law. This endorsement was placed on the check in a representative capacity and follows the procedure prescribed in Title 28, § 314, upon the proper assumption and presumption that the intended payee of the check was the Maryland corporation.

The course of conduct between the parties is a complete and unchallengable answer to any suggestion that the Treasurer of Baltimore County intended the check to be paid to the petitioner. The record shows that only the first check on this job was payable to the petitioner and that check was indorsed "For deposit only to the credit of Kahn Engineering Co., of Md. Inc., Special Account." Appellant could just as well complain that this indorsement was improper. The next three checks were payable in turn to the Maryland corporation and indorsed by that corporation. The next four checks (the last of the four being the check here at issue) were payable to Kahn Engineering Company. We thus see that out of the first eight checks issued by the Treasurer of Baltimore

County covering a period of eight months all of them went to the Maryland corporation. It is somewhat difficult, therefore, to give credence to petitioner's argument that it can be inferred that the Treasurer intended the checks be payable to it.

This course of conduct is corroboration of appellant's witness Kahn when he testified that he intended the proceeds of the job payments to go to the Maryland corporation and be used by it to pay job costs. (R. 56) As Kahn testified (R. 80), the Parkville money was "their money"—meaning money of the Maryland corporation.

This course of conduct is a complete answer to the argument that the petitioner was intended to be the named payee on the check and is completely dispositive of the issues raised by petitioner in its petition.

The intention of the Treasurer of Baltimore County, the maker of the check, was crucial to the petitioner's case. The plain undisputed fact is that petitioner did not call that officer or any witness to show that the intended payee of the check was petitioner. Petitioner did not explain its failure to call such witnesses or produce such testimony. *Wigmore on Evidence*, 3d ed. (1940), Vol. 2 § 285, at p. 162, states:

> "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*"

The trial court was, of course, entitled to take this fundamental rule of law into consideration in determining whether petitioner made a bona fide case. The essence of petitioner's argument is the erection of inference on inference and petitioner's case must

necessarily fall under the weight of the factual evidence against it and the applicable law.

The Circuit Court could just as validly have based its affirmance on any one of the following grounds:

1. Petitioner's evidence failed to show that the endorsement in question was unauthorized.

2. Petitioner failed to prove any damage.

3. Petitioner's evidence showed that the check in question was a bearer instrument not requiring endorsement.

4. Petitioner's evidence showed that it is precluded from asserting that the endorsement was unauthorized by its ratification thereof.

5. Petitioner's evidence showed that it is precluded from recovery by the doctrine of equitable estoppel or laches.

6. Petitioner's evidence showed that it is precluded from recovery by its contributory negligence.

Under all the circumstances the endorsement of the Maryland corporation to the check in question was proper and petitioner's case was correctly dismissed at the conclusion of its evidence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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June, 1959

EXHIBIT A

REQUISITIONS AND PAYMENTS ON PARKVILLE JOB

No.	Requisition Date	Requisition Submitted by	Named Contractor on Requisition	Amount of Requisition and Check	Date of Payment Check	Payee on Check	Indorsements on Checks (Other than Banks)
1	1/ 8/54	Kahn Engr. Co. Inc., Contractor	Kahn Engineering Company Incorporated	$13,806.44	1/20/54	Kahn Engineering Co. Inc.	For deposit only to the credit of Kahn Engineering Co. of Md., Inc., Special Account
2	2/ 4/54	L. Ray Troxell, Jr. President	Kahn Engineering Company of Maryland, Inc.	4,860.01	2/10/54	Kahn Engineering Co. of Md. Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
3	3/ 5/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Incorporated	17,541.00	3/10/54	Kahn Engineering Co. of Md. Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
4	3/20/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	18,940.50	4/ 9/54	Kahn Engineering Co. of Maryland, Inc.	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
5	4/30/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	22,343.85	5/12/54	Kahn Engineering Company	For deposit only to the credit of Kahn Engineering Co., Inc. of Md.
6	6/ 7/54	Ray Troxell Contractor	Kahn Engineering Company of Maryland, Inc.	18,175.50	6/16/54	Kahn Engineering Company	For deposit only Kahn Engineering Co.
7	7/ 1/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Md., Inc.	18,575.41	7/19/54	Kahn Engineering Company	Kahn Engineering Company L. Ray Troxell, Jr. President Payable to: Academy Construction, Inc. For deposit only to the credit of Academy Construction, Inc.
8	7/30/54	Ray Troxell, Jr. Contractor	Kahn Engineering Company of Maryland, Inc.	23,069.41	8/11/54	Kahn Engineering Company	Kahn Engineering Co. L. Ray Troxell, Jr. President Deposit to account of Academy Construction, Inc.